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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JASON C. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MICHELLE C.,

Defendant and Appellant.

D062698

(Super. Ct. No. SJ12565A-C)

APPEAL from orders of the Superior Court of San Diego County, Ana L. Espana,
Judge. Affirmed.

Michelle C. appeals juvenile court orders summarily denying her petition for
modification under Welfare and Institutions Code section 388¹ and terminating her
parental rights to her minor sons, Jason C., Brandon C. and Christopher C. (collectively,
the minors) under section 366.26. Michelle contends she was entitled to a hearing on her

¹ Statutory references are to the Welfare and Institutions Code.

section 388 petition because she made a prima facie showing her circumstances had changed and the proposed modification—an order for additional reunification services—was in the minors' best interests. She also challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating her parental rights. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2011, Michelle was arrested as she attempted to enter the United States from Mexico with a substantial amount of methamphetamine and heroin in her car. The drugs were hidden under the backseat where six-year-old Jason and three-year-old Brandon were sitting. Michelle, who was eight months pregnant with Christopher, admitted she knew the drugs were in her car. She said Julio C.,² who was her husband and the minors' father, had made arrangements for her to smuggle the drugs from Mexico to a location in Downey, California. Michelle admitted she used Jason and Brandon to distract border patrol agents in order to avoid getting stopped.

The San Diego County Health and Human Services Agency (Agency) filed petitions in the juvenile court under section 300, subdivision (b), alleging Jason and Brandon were at substantial risk of harm as a result of the parents' illegal activity. The court detained Jason and Brandon in out-of-home care. Christopher was born the next month while Michelle was in federal custody, and the Agency filed a sibling petition on

² Julio is not a party to this appeal.

his behalf under section 300, subdivision (j). The court detained Christopher in the foster home where Jason and Brandon were living.

Michelle was incarcerated at the Metropolitan Correctional Center (MCC) in San Diego. She was having weekly visits with the minors. After Michelle spoke to Julio, she recanted her statement that he was involved in drug smuggling.³ She claimed this was the first time she had tried to smuggle drugs.

At the jurisdiction and disposition hearing, the court sustained the allegations of the petitions, declared the minors dependents, removed them from parental custody and placed them in foster care. The court ordered reunification services for the parents. Julio, who lived in Tijuana, began participating in services, but discontinued doing so when he tested positive for methamphetamine. Michelle initially denied knowing about Julio's drug use, but then admitted she knew he was a methamphetamine user. When Michelle learned that Julio was living with another woman, she provided new information to law enforcement agents about Julio's drug trafficking activities.

Michelle was moved from MCC to a correctional facility outside San Diego County after being convicted of drug offenses. She no longer had weekly visits with the minors, but was able to call them once a week. Michelle again admitted that Julio knew about her drug trafficking. She now admitted having smuggled drugs on several occasions, and taking the two older minors with her when she engaged in this activity. She expressed her remorse and acknowledged she was wrong to want the minors placed

³ Michelle later said she tried to protect Julio so that he would be able to reunify with the minors.

with Julio, given his involvement in drug trafficking. Michelle was unable to participate in reunification services while incarcerated because her prison job assignment conflicted with the services offered.

The minors were thriving in their foster home with caregivers who were devoted to them. Jason's aggressive behaviors had subsided, and he was excelling academically. Brandon's speech, which was previously unintelligible, had improved significantly. Christopher was a happy baby who was bonded to his caregivers.

At the six-month review hearing, the court terminated reunification services and set a hearing under section 366.26 to select and implement permanent plans for the minors. In February 2012, Michelle was sentenced to prison for three years. She had maintained consistent contact with the minors by telephoning them every other week and occasionally sending them letters.

The social worker assessed the minors as adoptable and recommended adoption as their permanent plans. The caregivers wanted to adopt the minors and there were many other families interested in adopting a sibling set like this one. In the social worker's opinion, the benefits of adoption for the minors outweighed any possible detriment caused by terminating their relationship with their parents.

Michelle filed a section 388 petition for modification, seeking to have the court reinstate reunification services. The court denied the petition without an evidentiary hearing, finding Michelle had not made a prima facie showing of changed circumstances or best interests.

At the selection and implementation hearing, the court considered the evidence and arguments of counsel. The court found the minors were likely to be adopted and none of the exceptions to adoption applied. The court terminated parental rights and referred the minors for adoptive placement.

DISCUSSION

I

Michelle contends the court erred by summarily denying her section 388 modification petition. She asserts she made a prima facie showing her circumstances had changed and the proposed modification—reinstating reunification services—was in the minors' best interests.

A

A party may petition the court under section 388 to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence, and (2) the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The petition must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.*, at p. 310.) " '[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.' [Citation.]" (*In re Jasmon O.*, at p. 415.) If, however, "the liberally construed allegations of the petition

do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

B

Michelle's modification petition sought to have the court reinstate reunification services. As changed circumstances, the petition alleged Michelle was now housed in a facility where services were available; she was participating in and making significant progress with these services; she had the ability to complete her case plan; and she would be released from prison before the 24-month review hearing. In support of her request, Michelle attached a letter she wrote to the court stating her release date was in March 2013; a letter verifying that her prison job performance was satisfactory; transcripts from the General Educational Development Testing Centers; reports of her progress in counseling and drug treatment; and several certificates of completion for job training. The petition alleged that providing Michelle with additional reunification services was in the minors' best interests because she had raised Jason and Brandon for most of their lives; she maintained consistent contact with all three minors; she has addressed the

issues that caused the minors to become dependents; she will be able to provide them with a safe, stable home; and the goal of family preservation will be achieved.

Although Michelle completed various programs while incarcerated and maintained contact with the minors, "[n]ot every change in circumstance can justify modification of a prior order." (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.) Instead, "the problem that initially brought the child within the dependency system must be removed or ameliorated." (*Ibid.*; see also *In re B.D.* (2008) 159 Cal.App.4th 1218, 1230.) Here, the basis for the juvenile court's intervention and the primary reason for the minors' removal was Michelle's criminal activity, which resulted in a conviction and three-year prison term. Michelle did not make a prima facie showing she had changed the circumstance—her federal prison sentence—that prevented her from reunifying with the minors and resulted in the termination of her reunification services. (See *In re A.A.*, at p. 612 [incarcerated mother did not show changed circumstances where, despite completing various services and programs, she was still serving a prison sentence].) Because Michelle's projected release date was beyond the 24-month date for services,⁴ the problem that led to the minors' dependencies could not be ameliorated within the statutory reunification period. (See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532 [one criteria the court should consider in evaluating changed circumstances is seriousness of problem that led to dependency and reason for continuation of that problem].) Thus,

⁴ The social worker reported that Michelle's projected release date, according to the Federal Bureau of Prisons Inmate Locator Web site, is September 27, 2013.

the changes alleged in Michelle's petition were "not legally sufficient to require a hearing on her section 388 petition." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 465.)

In any event, Michelle's petition did not make a prima facie showing that offering her additional services, and thereby delaying permanency for the minors, would serve the minors' best interests. Although Michelle argues that the proposed modification would achieve the goal of family preservation, "[t]he presumption favoring natural parents by itself does not satisfy the best interests prong of section 388." (*In re Justice P., supra*, 123 Cal.App.4th at p. 192.) Further, Christopher was removed from Michelle's custody at birth and has never lived with her. Michelle's absence from the lives of Jason and Brandon since May 2011 has caused their relationship with her to deteriorate. The minors are thriving in the home of caregivers who are committed to adopting them. Given the additional time it would take Michelle to complete her prison sentence and participate in services, it would not be in the minors' best interests to postpone permanency. "The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.)

Once reunification services were terminated, Michelle's "interest in the care, custody and companionship" of the minors was no longer paramount. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; see also *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [summary denial of section 388 petition was proper where there was no showing of how the children's best interests would be served by depriving them of a permanent stable

home in exchange for an uncertain future].) Instead, the proper focus was on the minors' needs for stability, continuity and permanency, regardless of Michelle's interest in reunification. (*In re Stephanie M.*, at pp. 317-318; *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1507.) Because the liberally construed allegations would not have sustained a favorable decision on the section 388 petition, Michelle was not entitled to an evidentiary hearing. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 808; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205-206.)

II

Michelle challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating her parental rights. She asserts that despite the obstacles of her incarceration, she maintained regular and consistent contact with the minors. She further asserts she had a strong parent-child relationship with Jason and Brandon, and had developed a bond with Christopher, and those relationships outweighed the stability that adoption would provide.

A

After reunification services are terminated, the focus of a dependency proceeding shifts from preserving the family to promoting the best interests of the child, including the child's interest in a stable, permanent placement that allows the caregiver to make a full emotional commitment to the child. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the selection and implementation hearing, the court has three options: (1)

terminate parental rights and order adoption as the permanent plan; (2) appoint a legal guardian for the child; or (3) order the child placed in long-term foster care. (*Ibid.*)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the child under one of the specified statutory exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i)-(vi); *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if termination of parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase " 'benefit from continuing the . . . relationship' " to refer to a parent-child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord, *In re Jason J.* (2009) 175 Cal.App.4th 922, 936.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment from child to parent. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

We review an order terminating parental rights for substantial evidence. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

Here, Michelle's visitation and contact with the minors can fairly be characterized as regular, given the constraints of her incarceration. However, Michelle did not meet her burden of showing there was a beneficial parent-child relationship sufficient to apply the exception of section 366.26, subdivision (c)(1)(B)(i). Michelle had never parented Christopher, and although Jason and Brandon had a parental relationship with Michelle

while they lived with her, that relationship deteriorated over time and was no longer parental. Jason and Brandon now referred to their foster mother as "mom," and they did not ask about Michelle or express an interest in seeing her. Jason, who understood the concept of adoption, said he wanted his caregiver to become his mom. "A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466.) There was no showing the minors had a "significant, positive, emotional attachment" to Michelle such that terminating the parent-child relationship would result in great harm to the minors. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Jason J.*, *supra*, 175 Cal.App.4th at p. 938.)

Further, Michelle did not show that maintaining the parent-child relationship outweighed the benefits of adoption for the minors. At the time of the selection and implementation hearing, the minors had been out of Michelle's custody for 16 months. Jason's negative behaviors, caused by parental neglect and exposure to violence, had decreased as a result of receiving appropriate care from the caregivers. Brandon's speech drastically improved. The caregivers are the only parents Christopher has ever known, and they are committed to adopting all three minors. In the social worker's opinion, the benefits of adoption for the minors, including permanency and stability, outweighed any possible detriment that would be caused by severing the parental relationship. The court was required to, and did, weigh the strength and quality of the parent-child relationship, and the detriment involved in terminating it, against the potential benefit of an adoptive

home for the minors. We do not reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53.) Substantial evidence supports the court's finding the beneficial parent-child relationship exception did not apply to preclude terminating parental rights.

DISPOSITION

The orders are affirmed.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.